(2)

No. 90-980

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Petitioner

v.

EDMUND J. BODINE, JR.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

EMMETT ABDONEY, ESQUIRE
MARK WOLFE, ESQUIRE
(Counsels of Record)
EMMETT ABDONEY, P.A.
First Florida Tower
Suite 1100
Tampa, Florida 33602
(813) 223-5594

ATTORNEYS FOR RESPONDENT
EDMUND J. BODINE, JR.

QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD INVOKE ITS SUPERVISORY JURISDICTION WHERE THE OPINION OF THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY FOUND THAT, PURSUANT TO *LIFE INSURANCE COMPANY OF GEORGIA V. LOPEZ,* 443 So. 2d 947 (Fla. 1983), PHYSICAL "IMPACT" IS NOT A PREREQUISITE FOR EMOTIONAL DISTRESS DAMAGES AGAINST AN INSURANCE COMPANY AFTER AN INSURED HAS INFORMED THE INSURER OF A DEATH THREAT BY THE BENEFICIARY SINCE THE INSURED IS IN IMMINENT DANGER?

---

1 Respondent has re-cast the question, pursuant to Rule 34.2.

TABLE OF CONTENTS

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Reason for Denying Writ 3

Summary 3

Argument 4

Conclusion 10

TABLE OF AUTHORITIES

CASES: Page

Bodine v. Federal Kemper Life Assurance Co.,
912 F. 2d 1373 (11th Cir. 1990) 5, 6, 7, 8

Champion v. Gray,
478 So. 2d 17 (Fla. 1985) 5, 6

Life Insurance Company of Georgia v. Lopez,
443 So. 2d 947 (Fla. 1983) 2, 3, 4, 5, 6, 7, 8

Squros v. Biscayne Recreational Dev. Co.,
528 So. 2d 376 (Fla. 3rd DCA 1978)
rev. denied, 525 So.2d 880 (Fla. 1988) 6

State of Florida v. Exxon Corporation,
526 F. 2d 266 (5th Cir. 1976) 8, 9

STATUTE:

§ 25.031, Fla. Stat..... 8

No. 90-980

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Petitioner

v.

EDMUND J. BODINE, JR.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Edmund J. Bodine, Jr., respectfully requests that the Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's September 26, 1990 decision in this case.

STATEMENT OF THE CASE

Petitioner's statement of the case is generally accurate, and Respondent accepts it, with the following exceptions and additions:

1. The Honorable Elizabeth Kovachevich's order of January 23, 1989 granting partial summary judgement specifically preserved Bodine's claim against Federal Kemper for failing to cancel the insurance policy upon his life. It stated: "There remains

pending in this cause the issue of negligent failure to cancel the insurance policy, following notification of the existence of death threats, for approximately one month." Petitioner's Brief for Certiorari, Appendix B, (A.19).

2. Bodine thereafter continually asserted his understanding that Judge Kovachevich's order specifically allowed damages for pain and suffering and included such a category in his Statement of the Elements of Damages.

3. Federal Kemper filed a Motion in Limine immediately prior to trial with respect to damages for pain and suffering, which the Honorable Clarence C. Newcomer verbally denied prior to trial and which was followed by a written Order and Memorandum Opinion two days later. Petitioner's Brief for Certiorari, Appendix C, (A.20-25).

4. Regarding the significant discernible physical injury requirement, pursuant to *Life Insurance Company of Georgia v. Lopez*, 443 So. 2d 947 (Fla. 1983), counsel for Federal Kemper adduced explicit testimony on cross-examination from Plaintiff/Respondent to the effect that, on November 7, 1987, he was "physically ill," "couldn't keep his food down," "went to the bathroom and got sick" and "threw up," all immediately after conversations with Federal Kemper personnel who refused to cancel the policy of insurance upon his life.

5. The 11th Circuit found that "...Bodine called Kemper on November 7, 1983, and demanded that Kemper cancel the insurance polic(y)" on his life, not November 11, 1983, which was the date of notification cited by the Petitioner. Petitioner's Brief for Certiorari, Appendix A, (A.2), and at 5.

6. During the trial, Dr. Daniel Sprehe, a board certified psychiatrist, testified that, as a result of the contract killing death threat and the subsequent failure of the insurance company to cancel the policy after notification, the Plaintiff suffered a "paranoid disorder" and sustained "permanent emotional scarring." Dr. Sprehe was the only expert witness who testified as to pain and suffering damages. The Defendant presented no

evidence, no expert witnesses and no witnesses in opposition of Plaintiff's pain and suffering claim.

7. Finally, Petitioner states "It was undisputed that Bodine did not know the policy had not been canceled until December 2, 1983." Petitioner's Brief for Certiorari at 5. However, the evidence was, as noted in the 11th Circuit's opinion, that Mr. Bodine did not receive notice that the policy had been canceled until February 28, 1984. Petitioner's Brief for Certiorari, Appendix A, (A.9 n.9).

REASON FOR DENYING WRIT

SUMMARY

In *Life Insurance Company of Georgia v. Lopez,* 443 So. 2d 947 (Fla. 1983), the Supreme Court of Florida recognized a negligence cause of action by an insured against his insurance company for failure to cancel a policy of life insurance where the insurer had actual knowledge of a death threat against the insured by the beneficiary of the policy.

Petitioner acknowledges liability as to damages for lost earnings and out-of-pocket earnings, but argues that the Plaintiff/Respondent must suffer some physical "impact" to recover damages for emotional distress. The Trial Court and the 11th Circuit found that, pursuant to *Lopez,* the risk of injury to the insured was so great due to a death threat that the *Lopez* court would have not required "impact" in this case.

Further, the Trial Court and the 11th Circuit found that the significant discernible physical injury requirement was fulfilled by the Plaintiff/Respondent becoming ill after being informed by the Petitioner that the insurance policy would not be canceled unless requested by the beneficiary, who was plotting to kill the Plaintiff. Consequently, the 11th Circuit has properly applied the *Lopez* decision and this Petition should be denied.

ARGUMENT

WITH RESPECT TO THE DISPOSITIVE ISSUE OF WHETHER PHYSICAL IMPACT IS A PREREQUISITE FOR EMOTIONAL DISTRESS DAMAGES AFTER AN INSURED HAS INFORMED THE INSURER OF A DEATH THREAT BY THE BENEFICIARY, THE ELEVENTH CIRCUIT PROPERLY APPLIED FLORIDA LAW PURSUANT TO *LIFE INSURANCE COMPANY OF GEORGIA V. LOPEZ*, 443 SO. 2d 947 (FLA. 1983), THEREBY NOT JUSTIFYING THIS COURT EXERCISING ITS SUPERVISORY JURISDICTION.

As noted in Kemper's Petition, in *Life Insurance Company of Georgia v. Lopez*, 443 So. 2d 947 (Fla. 1983), the Supreme Court of Florida recognized a negligence cause of action by an insured against his insurance company for failure to cancel a policy of life insurance where the insurer had actual knowledge of a death threat against the insured by the beneficiary of the policy.

Petitioner also acknowledges that "the opinion sought to be reviewed. . .adequately sets forth the underlying facts upon which the jury could have found Kemper was negligent in failing to cancel the policy. . ." Petitioner's Brief for Certiorari at 4. (Petitioner acknowledges liability to the Plaintiff/Respondent by not appealing and subsequently paying the damage award by the trial jury for lost earnings and out-of-pocket expenses.)

Consequently, the petitioner relies soley on the issue of whether some actual physical "impact" is a necessary prerequisite to recover for emotional distress damages stemming from negligence. However, the U.S. Middle District Court of Florida and the Eleventh Circuit Court of Appeals carefully considered this issue in regards to the *Lopez* case. Specifically, the Eleventh Circuit adopted the language of the District Court who stated:

> I conclude that the Florida Supreme Court would not find that the "impact rule" would create any principled "threshold" of injury that would separate meritorious claims from those which are not meritorious. The doctrinal trend in Florida, as evidenced by the Supreme

> Court's decision in *Champion,* is to a relaxation of the "impact rule" in situations where the rule creates an arbitrary bar to those who should be compensated for emotional distress-related injury. *It is clear from Lopez that the Florida Supreme Court believes that those injured by the negligence of the insurance companies in cases such as this one should be compensated.* As in the scenario in *Champion,* the Court believes that the harm is "too great to require direct physical contact." *There may be no emotional distress greater than the fear that one's life is constantly in danger from an unknown assailant.* Therefore I conclude that the application of the "impact rule" would create the type of unprincipled threshold which the Supreme Court sought to avoid in *Champion,* and would nearly eradicate the recovery under the cause of action it purposefully created. (Emphasis added).
>
> *Bodine v. Federal Kemper Life Assurance Co.,* 912 F. 2d 1373, 1377 (11th Cir. 1990). Petitioner's Brief for Certiorari, Appendix A, (A.7).

Further, the Petitioner relies heavily on the fact that there was an attempted murder in *Lopez* thereby satisfying the physical impact requirement. However, the Eleventh Circuit addressed that issue and stated the following:

> Although there was physical impact in *Lopez* in the sense that the threatened murder was actually attempted, nothing in the opinion suggests that there was a *sine qua non* of the cause of action. Moreover, it is obvious that in most *Lopez* situations the threatened murder will be intercepted by law enforcement action so that no physical impact will occur; yet, nothing in *Lopez* opinion suggests that the cause of action will exist only in those rare situations where the murder is actually attempted such that there is a physical impact on the insured.
>
> *Bodine, supra,* at 1377. Petitioner's Brief for Certiorari, Appendix A, (A. 7, 8).

Likewise, the Court went on to explain that the rational for the impact rule is satisfied by the strict requirements of the *Lopez*

claim. Specifically, the Court noted that a *Lopez* claim is predicted on actual notice to the insurance company which could lead to serious consequences to the beneficiary if the notice was fraudulent. Specifically, the Court stated:

> Another factor supporting our conclusion is that the strict prerequisites for a *Lopez* claim greatly reduce the risk of fraudulent claims, thus satisfying the *raison d'etre* for the impact rule. A *Lopez* claim arises only where the insurance company receives actual notice of intention on the part of a policy beneficiary to murder the insured. It is unlikely that an insured would manufacture such a claim and give the required notice to the insurance company, because the police investigation which would naturally ensue would almost surely uncover the scheme and subject the insured to severe consequences. Moreover, in the event of an actual murder scheme of the *Lopez* type, the likelihood of fraudulent claims of psychic trauma is mitigated by the fact that emotional distress is very reasonable under such circumstances. In a similar circumstance, the Florida Supreme Court has held that it is sufficient if the psychic trauma manifests itself in significant discernible physical injuries. *Champion v. Gray,* 478 So. 2d 17 (Fla. 1985).
>
> *Bodine, supra,* at 1378. Petitioner's Brief for Certiorari, Appendix A, (A.8).

In addition, the Court went to great lengths to explain the distinction between this case and the case of *Sguros v. Biscayne Recreational Dev. Co.,* 528 So. 2d 376 (Fla. 3rd DCA 1978), *rev. denied,* 525 So. 2d 880 (Fla, 1988), which was cited extensively by the Petitioner. Specifically, the Court notes that, in *Lopez* and *Champion,* both actions were "nontraditional cause of actions and both involve a great likelihood that the impact rule would rarely be satisfied." *Bodine, supra,* at 1378 n. 7. Petitioner's Brief for Certiorari, Appendix A, (A.8 n. 7). As a practical matter, the consequences of requiring "impact" in this situation are too severe since the insured would have to be either murdered or suffer serious bodily injury before the insurance company could be held liable.

Regarding the Florida Supreme Court's requirement that the Plaintiff show a "significant discernible physical injury" to satisfy the *Lopez* rule, the Court of Appeals indicated that it reviewed the record and found sufficient evidence to satisfy the rule. *Bodine, supra,* at 1378 n. 8. Petitioner's Brief for Certiorari, Appendix A, (A.9 n. 8). Specifically, the Court had evidence before it which was specifically adduced at trial by counsel for Federal Kemper on cross-examination. Defense counsel elicited testimony from Mr. Bodine to the effect that he was "physically ill," "couldn't keep his food down," "went to the bathroom and got sick" and "threw up," all immediately after conversations with Federal Kemper personnel who refused to cancel the policy of insurance upon his life. Certainly, becoming ill and "throwing up" is a discernible physical impairment under any objective standard.

The Petitioner further attempts to insinuate that the Plaintiff/Respondent became ill due to the death threat contract prior to notice to the Petitioner. The Petitioner states:

> Bodine testified that on November 7, 1983, he became sick at the house of his partner, Yordan and testified generally about "...a rash a few days after visiting Yordan." *This was prior to the November 11, 1983 date cited in the opinion, Appendix A, (A.3), as the date upon which the Jury could have found that Kemper had sufficient knowledge of the plot* and time to investigate and should have cancelled the policy. (Emphasis added).
>
> Petitioner's Brief for Certiorari at 5.

However, such is not the case. The 11th Circuit stated:

> In this case, the FBI uncovered a plot to murder Bodine. Initially, no one was certain who was arranging Bodine's death. However, it was discovered that William Stroup, one of Bodine's partners was behind the plot to murder Bodine so that his company, Cayman Films, Ltd., would collect on the $2,000,000.00 key man life insurance policy which Kemper had issued on Bodine's life. Philip Yordan, another partner whose life was also in danger, and *Bodine called Kemper on November 7, 1983, and*

> *demanded that Kemper cancel the insurance policy of both of their lives.* There was evidence from which the Jury could have reasonable found that *by early 1983, Kemper had actual notice of facts sufficient to trigger its duty under Lopez.* (Emphasis added)

Bodine, supra, at 1374. Petitioner's Brief for Certiorari, Appendix A, (A.2, 3).

It is clear that the Jury found, and the Trial Judge and the 11th Circuit agreed, that the significant discernible physical injury occurred after notice to the Petitioner.

Finally, Respondent acknowledges that Florida Statute 25.031 gives this Court the authority to certify questions to the Florida Supreme Court. However, the Respondent would point out that the *Lopez* issue has been addressed by the learned trial court, as well as a unanimous panel of the Eleventh Circuit Court of Appeals, and both have found that the *Lopez* decision applies to this case and, on a petition for rehearing, the Eleventh Circuit, exercising its discretion, declined to certify the question. (It is also noteworthy that the Petitioner never requested that the issue be certified to the Florida Supreme Court until after the 11th Circuit ruled in favor of Mr. Bodine.)

Regarding certifying questions, the 5th Circuit, in *State of Florida v. Exxon Corporation,* 526 F. 2d 266 (5th Cir. 1976), declined to certify the state law question in that case to the Florida Supreme Court. Citing the fact that the Florida law in the area was "fairly clear," the court stated that the delay involved when balanced against the need for "absolute certainty in judicial decisions" did not allow for the certification. The 5th Circuit stated:

> We must consider an inevitable side effect of certification-delay. The experience in our circuit has been that the process requires a period approaching one (1) year at the least — sometimes much more. . . In this case, with the law on this issue fairly clear, we find the price certainly too high, in terms of delay which may prejudice the plaintiff's rights to a speedy resolution of the merits.

State of Florida v. Exxon, supra, at 275, 276.

Similarly, in this case, the lawsuit was filed in 1985. The *Lopez* issue has been addressed by the trial court and by the Appellate Court and to continue to readdress the issue will do nothing more than further delay the payment of damages which are rightfully owed to the Plaintiff.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not be issued to review the Judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
EMMETT ABDONEY, ESQUIRE
MARK WOLFE, ESQUIRE
(Counsels of Record)
EMMET ABDONEY, P.A.
First Florida Tower
Suite 1100
Tampa, Florida 33602
(813) 223-5594

ATTORNEYS FOR EDMUND J.
BODINE, JR., RESPONDENT